

REMARKS

Favorable reconsideration of this application, as amended, and in light of the following discussion is respectfully requested. Claims 13-14, 16-17, 19-20, 23, 26-28, 31, 34-37, 40, 42-43, 54-90, and 97-128 are pending.

Restriction Requirement

Applicants would like to thank Examiner Paden for her withdrawal of the outstanding restriction requirement and the examination of all pending claims.

Rejections Based upon Stefandl

The Examiner has rejected claims 31, 34-37, 40, 42, 43, 54, 108-112 and 115-126 under 35 U.S.C. § 103(a) as being unpatentable over Stefandl in view of Beyts and further in view of the admitted state of the prior art at paragraph [002] of Applicant's specification or Frank, U.S. Patent No. 5,806,550.

Stefandl is alleged to teach a freezer altering additive for a composition made from a carbohydrate, glycerol or propylene glycol and a sugar alcohol such as sorbitol or erythritol. The freeze altering composition is simply added to a bottle and the bottle is tossed in the freezer to form a slush beverage. The Office concedes that Stefandl differs from the claimed invention which includes both the use of a high intensity sweetener in the product and a sugar alcohol as a sweetener. Beyts is added to address these deficiencies. Frank has been added to acknowledge that commercial beverage dispensers are known in the art.

The Office takes issue with the 1.131 Declaration. Specifically, the Office continues to maintain that no high intensity sweetener is provided in the lab notebook

pages. Further, the Office takes the position that the notebook is not commensurate with the claims since it does not include the flavor component. "[I]t is the examiner's position that the taste of the produce is essential to the development of the final product." This rejection is respectfully traversed.

As discussed at length in prior responses, a composition which is capable of freezing under home freezer conditions is not the same as a composition that can be dispensed from a mechanical dispensing device. Contrary to the position taken by the Office, nothing within Stefandl or Beyts teaches or suggests that the beverage syrup as disclosed therein is appropriate for dispensing from a mechanical dispenser having a mechanical mixing chamber. The Examiner dismisses the environment as not being important when, in fact, it goes to the very heart of what Applicants discovered. As disclosed and claimed, Applicants produced a beverage syrup from a mixture of a high-potency non-caloric sweetener and a low caloric sugar which is dispensable from a mechanical dispensing device. Prior to the present invention, it was not possible to produce a commercially viable beverage in a commercial beverage dispenser. As correctly noted by the Examiner, taste and beverage consistency are both aspects of the invention. The prior art does not teach or suggest the result achieved by the present invention. One skilled in the art would not expect the beverage that could freeze in a home freezer to be appropriate for use in a mechanical mixing device since the freeze conditions are so different.

Since none of Stefandl, Beyts or Frank teach or suggest a beverage capable of being dispensed from a dispenser including a mechanical mixing chamber, withdrawal of this ground of rejection is respectfully requested.

Rejections based on Marulich

Claims 13, 14, 16, 17, 19, 20, 23, 26-28, 31, 34, 35, 37, 40, 42, 43, 54-90, 97-102 and 106-127 have been rejected under 35 U.S.C. § 103(a) over Marulich in view of Beyts and in some instances in further combination with one or more of Cole, DeCock and Anderson. The Examiner maintains this rejection for the reasons of record.

Marulich, like Stefandl, is concerned with the production of slush beverages in a home freezer. For all of the reasons of record and those discussed above, there is no suggestion that the beverage of Marulich even as modified by Beyts, Cook, DeCock, or Anderson would be capable of being dispensed from a mechanical dispenser. Since Marulich, alone or in combination with the other cited references, does not teach a beverage capable of being dispensed from a mechanical dispenser, withdrawal of this ground of rejection is respectfully requested.

Conclusion

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and the continued examination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

/Lori-Ann Johnson/

Dated: May 21, 2007

By: _____
Lori-Ann Johnson
Reg. No. 34,498